UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ENTERGY NUCLEAR VERMONT YANKEE, LLC and ENTERGY NUCLEAR OPERATIONS, INC., *Plaintiffs*,	)	
v.	)	Docket No: 1:11-CV-99
PETER SHUMLIN, in his official capacity as GOVERNOR OF THE STATE OF VERMONT; WILLIAM SORRELL, in his official capacity as the ATTORNEY GENERAL OF THE STATE OF VERMONT; and JAMES VOLZ, JOHN BURKE, and DAVID COEN, in their official capacities as members of THE VERMONT PUBLIC SERVICE BOARD, *Defendants*.	)	

NEW ENGLAND COALITION, INC.'S PROPOSED *AMICUS CURIAE* MEMORANDUM OF LAW IN OPPOSITION TO THE COMPLAINT

NOW COMES the New England Coalition, Inc., by and through its attorneys, Jared M. Margolis, Esq. and Brice Simon, Esq., and hereby submits the following Memorandum of Law supporting Defendants' Opposition to Plaintiffs' Complaint.

MEMORANDUM OF LAW

I. The State's Actions Are Not Preempted

Supreme Court precedent explicitly states that the regulation of nuclear facilities is one of dual jurisdiction, with States retaining significant authority to regulate matters pertaining to traditional State concerns regarding economic and land-use related impacts. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 203-

204, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983) (herein "*PG&E*"). Generally, the ways in which federal law may pre-empt State law are well established and in the first instance turn on congressional intent. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990). Congress' intent to supplant State authority in a particular field may be express in the terms of the statute. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 51 L. Ed. 2d 604, 97 S. Ct. 1305 (1977). Absent explicit pre-emptive language, Congress' intent to supersede State law in a given area may nonetheless be implicit if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of State laws on the same subject," or if the goals "sought to be obtained" and the "obligations imposed" reveal a purpose to preclude State authority. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). When considering pre-emption, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-605 (U.S. 1991) (quoting *Rice*, supra, at 230).

The Supreme Court specifically stated in *Pacific Gas & Electric Co.*, 461 U.S. 190 (1983) that Congress:

> intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that States retain their traditional responsibilities in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related State concerns.

PG&E at 205. The Court further noted that the Atomic Energy Act itself preserves State authority over the regulation of nuclear plants, as long as that regulation is not specific to

radiological health and safety. *See Id*. at 209 - 210 (citing 42 U.S.C. § 2021(k)) ("Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.").[1]

The Court even explained how this dual jurisdiction is divided into separate areas of State and Federal authority:

> This account indicates that from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear powered electricity generation: the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.

PG&E, at 211 - 212 (emphasis added). The Supreme Court's ruling in *PG&E* therefore provides significant jurisdiction for the State to regulate Vermont Yankee. While it remains clear that the State cannot directly regulate radiological safety, the State may act within the areas of traditional State concern, such as to protect the economic or land-use interests of Vermont, and actions taken for those purposes are not preempted pursuant to *PG&E*. *Id.* State authority remains unless there is a direct conflict with federal requirements, and it is clear that the statues enacted by Vermont create no such conflict.

The Supreme Court in *PG&E* stated that "[t]he test for preemption is whether 'the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *PG&E* at 213 (citation omitted). Entergy has made no showing, nor could they, that any federal act provides the NRC with jurisdiction over the economic or environmental concerns enunciated in Acts 160 and 189. In fact, even the NRC has made it clear that "the NRC does not have a role in the energy-planning decisions of State regulators and license officials…. Thus, whether the

[1] In fact, the Court then added that, "Congress, by permitting regulation 'for purposes other than protection against radiation hazards' underscored the distinction drawn in 1954 between the spheres of activity left respectively to the Federal Government and the States." *Id*.

facility will continue to operate is based on factors such as the need for power or other matters within the state's jurisdiction…."[2] As set forth below, the challenged statutes are concerned with the non-preempted economic and environmental concerns the State has over the continued operation of VY and are therefore valid on their face. Furthermore, Vermont does have legitimate, non-preempted concerns that justify denying Vermont Yankee permission to continue operation.

The Court in *PG&E* went on to discuss the fact that Congress did not intend to remove states' authority to regulate nuclear power plants, and that "statements on the floor of Congress confirm that while the safety of nuclear technology was the exclusive business of the Federal Government, state power over the production of electricity was not otherwise displaced," by the Atomic Energy Act. *PG&E* at 213. Entergy's attempts to eviscerate the State's authority – recognized by the Supreme Court and Congress – is nothing more than a last ditch attempt to keep Vermont Yankee operating when the State has made a valid decision, which Entergy had repeatedly agreed to let the State make, that continued operation is not in the best interests of Vermont.

Entergy endeavors to have this Court rule that the binding Supreme Court precedent of *PG&E* should be ignored; however, the dual jurisdiction affording states a continuing role in the regulation of nuclear power plants is ensconced in the language of AEA and the Court's decision in *PG&E*. It cannot be disregarded simply because Entergy does not like the result – their years of mismanagement, various calamities (i.e. cooling tower collapse, transformer fire etc.) and recent misrepresentations regarding underground piping, as well as aging management concerns (as discussed further below), all combined to lead Vermont to the conclusion that VY is not

[2] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction at 9 (Kolber Decl. Ex. 1 - NRC, Final Report (March 2006)).

reliable, and therefore continued operation is not in the economic or environmental interests of our State.

Plaintiffs further argue that the Supreme Court in *PG&E* made a distinction between the States' role in permitting new nuclear power plants to be built (which they agree States have the authority to deny), and the operation of an existing nuclear power plant, which Plaintiffs' argue is entirely preempted. Plaintiffs' Complaint at 8. This distinction was not made by the Court in *PG&E*, which provided for dual jurisdiction over nuclear power plants, and is further inapposite for this matter. The State of Vermont is not in any way attempting, in the challenged statutes, to dictate how Vermont Yankee is operated, but rather is asserting authority to decide whether the plant should continue to operate past its initial license period. If the State has the ability to make an initial decision as to whether a nuclear power plant should be allowed to operate in the State (as even Plaintiffs affirm), it follows that when the initial 40-year license period approved by the State ends, it is again within the State's purview to decide whether it is in the public interest to have a nuclear power plant operating in the State.

This is an issue of first impression, and clearly the Supreme Court in *PG&E* was not contemplating the relicensing process (since no plant would be up for relicensing for another 30 years); however, the public policy and legal analysis inherent in the Court's decision in *PG&E*, providing dual State/Federal jurisdiction over nuclear power plants and allowing States to decide whether it is in their best interests to allow a nuclear plant to operate and accumulate Spent Nuclear Fuel in-state, supports the States' right to then have the same authority to decide, after the approved license period ends, whether continued operation should be permitted.

Entergy's arguments rely heavily on a statement found in *PG&E* wherein the Court provided that "we emphasize that the statute does not seek to regulate the construction or

operation of a nuclear power plant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with NRC's exclusive authority over plant construction and operation." Plaintiffs' Complaint at 8 (citing *PG&E* at 212). Entergy, however, takes this statement to mean that absolutely nothing can be done by the State that could in any way affect plant operations. This is clearly not what the Court intended, given that the Court also provided for dual jurisdiction over nuclear power plants, with states retaining traditional authority over economic and land-use concerns as is discussed above.

In fact, this language from *PG&E* upon which Entergy relies is followed by a discussion that limits its applicability, making it clear that preemption is limited to situations in which a state attempts to impose safety regulations regarding radiological standards, which would clearly affect the operation of a plant and therefore be preempted by NRC jurisdiction. *PG&E* at 212-213. Whereas the Vermont legislature did not, in the challenged statutes, attempt to institute any standards or protocols regarding radiological safety that would affect plant operations, the language relied on by Entergy from *PG&E* is inapplicable to the current matter.

The Court in fact clarified the scope of federal preemption in *English v. General Electric Co.,* 496 U.S. 72 (1990). In that case, the Supreme Court reiterated the dual-jurisdiction that exists regarding nuclear power plants, and clarified the limited scope of federal preemption, holding that "state action will be preempted if it has a 'direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels,'" and even added that "this does not include 'every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities….'" *Id.* at 85 (citations omitted – emphasis added). The corollary of the Supreme Court's decision in

General Electric is that state action – even action concerning plant construction and operation – that does not directly and substantially affect radiological safety levels, is not preempted. Therefore, Entergy's claim that any state action affecting plant construction and operation is preempted as a matter of law is simply not true.

The language quoted above indicates that the Supreme Court in *General Electric* did not intend to alter its holding in *PG&E*, which provided that States retain jurisdiction over traditional State concerns, but was merely clarifying that only control over radiological safety levels remains within NRC's exclusive jurisdiction. Where the State's actions do not pertain to radiological safety levels, as is the case in this matter where pursuant to Act 160 the State must balance economic, reliability and land use concerns to decide whether continued operation is within the best interests of the State, there is no preemption pursuant to *General Electric*.

NEC's argument herein is consistent with the NRC regulations cited by the Defendants in their Opposition to Plaintiff's Motion for Preliminary Injunction, which clearly indicates that NRC oversight of relicensing pertains to the health and safety aspects of plant operations, but "the NRC does not have a role in the energy-planning decisions of state regulators and license officials…. Thus, whether the facility will continue to operate is based on factors such as the need for power or other matters within the state's jurisdiction…." Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 9 (Kolber Decl. Ex. 1 - NRC, Final Report (March 2006)).

It is therefore clear that Vermont retains jurisdiction and authority over the economic, environmental and land-use related concerns regarding continued operation of the Vermont Yankee plant. In fact, as is discussed below, the State is the only entity that has the ability to ensure that the State's economic and environmental interests are protected, since the NRC only

regulates the radiological health and safety of nuclear power plants, leaving the State to oversee traditional state concerns (e.g. economics and environment). Where, as is the case here, the legislation is valid on its face, and the State has valid non-preempted concerns upon which the decision to deny continued operation was based, the State's actions are valid, and Entergy's claims must be denied.

II. The Challenged Statutes Are Facially Valid And Vermont Had Valid Reasons For Denying Continued Operation Of Vermont Yankee

A. The Court Must Not Rely On The Legislative Record, But Rather Look To The Actual Legislation That Was Passed, Which Is Facially Valid

The Supreme Court made it clear in *PG&E* that not only do states retain the right to deny the construction of a nuclear power plant on economic grounds, but that the Court will not rely on the legislative record to determine the State's motive in passing a law that pertains to nuclear power plants. The Court stated:

> Although these specific indicia of California's intent in enacting § 25524.2 are subject to varying interpretation, there are two further reasons why we should not become embroiled in attempting to ascertain California's true motive. First, inquiry into legislative motive is often an unsatisfactory venture. *United States v. O'Brien,* 391 U. S. 367, 391 U. S. 383 (1968). What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it. Second, it would be particularly pointless for us to engage in such inquiry here when it is clear that the States have been allowed to retain authority over the need for electrical generating facilities easily sufficient to permit a State so inclined to halt the construction of new nuclear plants by refusing, on economic grounds, to issue certificates of public convenience in individual proceedings. In these circumstances, it should be up to Congress to determine whether a State has misused the authority left in its hands.

PG&E at 216 (emphasis added). Entergy has attempted to argue that the only basis for the State's actions is concerns regarding radiological health and safety, and points to the legislative record, wherein certain legislators discussed nuclear safety during hearings, as evidence that this

was Vermont's sole concern. This Court, however, cannot take the words of a few individual legislators, and ascribe those statements to the entire legislature. As the Supreme Court noted, "inquiry into legislative motive is often an unsatisfactory venture, since what motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." *Id.* The Court must therefore look to the language of the legislation that was passed into law to determine whether Vermont legislators were attempting to regulate Vermont Yankee based on preempted matters.

It is readily apparent from the language of Acts 160 and 189 that the legislature was regulating Vermont Yankee relative to non-preempted, traditional State concerns over the economic and environmental impacts of continued operation of the Vermont Yankee plant. Right at the outset, Act 160 provides the basis for the enactment of the statute, and the non-preempted concerns over which the State asserted jurisdiction. Act 160 states:

> (a) It remains the policy of the state that a nuclear energy generating plant may be operated in Vermont only with the explicit approval of the General Assembly expressed in law after full, open, and informed public deliberation and discussion with respect to pertinent factors, <u>including the state's need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of power sources among various alternatives</u>.

(emphasis added). These are precisely the types of matters that the Supreme Court in *PG&E* found to be within the States' retained jurisdiction. *See PG&E* at 205 ("States retain their traditional responsibilities in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns."). Act 160 makes no mention that the State is attempting to regulate the radiological health and safety of Vermonters, and therefore Act 160 is facially valid and Entergy's challenge must fail.

Similarly, Act 189 was passed due to concerns over the reliability of the plant, the operation of which has economic and environmental implications within the State's purview. Act 189 provides the reason for the reliability assessment:

> Entergy Nuclear Vermont Yankee has had one of the highest percentage power increases of any plant in the country and now is applying for a 20-year life extension beyond its 40-year design. It is therefore the intent of the general assembly to determine on behalf of the people of the state of Vermont the reliability issues associated with operating ENVY for an additional 20 years after its scheduled closure in 2012.
>
> It has been a reliable generation source for Vermont. However, in 2007 it experienced two operational difficulties that required that it reduce power or go to zero power production. When the station reduces power output or does not produce power, Vermont utilities have to purchase market power, often at a greater price to our citizens. It is in the State's economic interests to ensure that the station is a reliable source of power.

No. 189, Sec. 1(b) and (c) of the Acts of the 2007 Adj. Sess. (2008) (emphasis added). The economic implications of continued operation are therefore set forth in Act 189 – Vermont Yankee is an aging plant operating well above its power and design life. Aging management concerns and the potential for operational difficulties, of which Vermont Yankee has a history, make continued operation a gamble for Vermont. A gamble which the Vermont Senate apparently decided not to take. Whereas the economic concerns set forth in the challenged statutes are well within the State's authority under the dual regulation of nuclear power plants, there is no basis for finding that the challenged statutes are preempted, and Entergy's claims must be denied.

B. Vermont Had Valid, Non-Preempted Bases For Denying Continued Operation Of VY

As discussed above, Act 160 was specifically concerned with the "state's need for power, the economics and environmental impacts of long-term storage of nuclear waste, and choice of

power sources among various alternatives." Similarly, Act 189 called for a comprehensive assessment of the Plant's reliability, because "it is in the State's economic interests to ensure that the station is a reliable source of power." Entergy has argued that that there is no valid basis for the State's decision not to relicense the plant, even if the State does have authority to do so on economic grounds. This is incorrect. Not only is it clear from *PG&E* that the State does have such authority, there is ample reason on the record before the Public Service Board and the Legislature to deny continued operation on non-preempted economic grounds.

In fact, Act 189 provides the basis for the State's non-preempted economic concerns right in the text of the Act. It states that while VY has been reliable in the past, "in 2007 it experienced two operational difficulties that required that it reduce power or go to zero power production. When the station reduces power output or does not produce power, Vermont utilities have to purchase market power, often at a greater price to our citizens." Act No. 189, Sec. 1(c). The reliability of the plant is therefore central to the economic concerns of the State in deciding whether it is in Vermont's best interests to allow continued operation – an issue the NRC does not regulate. *See* Letter from Nils Diaz, Chairman, USNRC to Mr. Michael H. Dworkin, Chairman, Vermont Public Service Board, 05/05/2004 (Exhibit 1 attached to Declaration of Raymond Shadis, dated September 2, 2011, filed herewith and incorporated herein by reference).[3]

The Vermont Yankee Plant is now 40 years old, and has been operating at 120% of its design basis for several years. One of the concerns inherent in a plant that has operated for this long is aging management, and the integrity of the plant's components. Act 189 acknowledges Vermont's concerns regarding aging management, calling for a review of whether "the

[3] The letter states: "NRC regulations and its oversight process focus on ensuring nuclear safety, whether the facility is operating at power or shut down. The NRC's statutory authority does not extend to regulating the reliability of electrical generation." *See* Diaz Letter at 1 (emphasis added).

management system for aging components [has] been adequately maintained to assure the components meet the design basis," and whether "the aging factors discovered [are] actually being repaired in a timely manner." No. 189, Sec. 4(7) and (8) of the Acts of the 2007 Adj. Sess. (2008).

Concerns regarding aging management became central to the debate over the future of Vermont Yankee when it was revealed last year that not only did the plant have underground pipes carrying radionuclides, contrary to the claims made by Entergy representatives, but that those pipes had degraded to the point of leaking contaminated water into the soil and groundwater of Vermont (a public trust resource). As discussed in NEC's Memorandum of Law supporting Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, this revelation eroded the State's trust in Entergy, and the lack of faith in their management is itself a reasonable basis not to relicense the plant; however, the leaking pipes also suggest that there is a potential for more aging management problems that may lead to down-powering or shutdowns that would harm the economic interests of Vermont.

In Public Service Board Docket 7440, it also became clear that there were certain aging management issues that would implicate the reliability of the VY Plant into the future. A perfect example is the plant's condenser, which has been experiencing in-leaking, and which has been deemed unreliable for operation through the 20 year relicensing period. Entergy plans on replacing the condenser sometime in 2013 or 2014. *See* Excerpt from Transcript of Docket 7440 proceeding, 5/26/09 at 115-116 (Colomb) (Exhibit 2 attached to the Declaration of Raymond Shadis, dated September 2, 2011 and incorporated herein by reference). Replacement of the condenser would cost somewhere on the order of $100-150 million. *See* Shadis Decl. ¶ 3; *and*

Vermont Yankee Nuclear Plant to Refule Despite Uncertainty, Burlington Free Press, July 25, 2011 (Exhibit 3 attached to Shadis Decl. and incorporated herein by reference).

Entergy witness and Site Vice-President Mr. Colomb in fact admitted that the ongoing problems associated with in-leakage in the condenser and condenser tube wear and erosion could cause short-term reliability problems during the operation of the plant under the existing license. *See* Excerpt from Docket 7440 Tr. 5/26/09 at 116 (Colomb) (Exhibit 2 attached to the Shadis Decl. and incorporated herein by reference. Mr. Colomb further admitted that if the condenser loses efficiency, the plant would have to reduce power output, especially if the condenser were to not be operating properly during the summer months. *Id.* at 117. Should the condenser fail, the plant would most likely have to shut down until it was replaced. *Id.* at 117-118.

The NSA Team[4] found that the current condition of the condenser is posing a challenge to both near term and long term reliability at VY. *See Excerpt* from the NSA Reliability Assessment at 4 (Exhibit 4 attached to the Declaration of Raymond Shadis, dated September 2, 2011, and incorporated herein by reference). They also noted that Entergy has put off re-tubing or replacing the condenser until after the decision is made regarding relicensing. *Id.* The Vermont Legislature was no doubt aware of this, since the Public Oversight Panel Report ("POP") (the report specifically prepared by the POP for the Legislature) notes that "condenser erosion… [is] both a near-term and long-term reliability challenge," and that "the increased probability of reliability problems from the condenser will now extend into the early years of extended operation, if granted. *See* Public Oversight Panel Report at ii-iv (Exhibit 5 attached to the Declaration of Raymond Shadis, dated September 2, 2011, and incorporated herein by reference).

[4] Nuclear Safety Associates (NSA) was commissioned by the Department of Public Service to conduct the review set forth in Act 189 – the Comprehensive Reliability Assessment.

The potential failure of the condenser, and the impending need to replace it, pose reliability concerns for Vermont that implicate non-preempted economic matters. In Docket 7440, Entergy witness Mr. Colomb also admitted that if the condenser were to fail, the plant would have to conduct a cost/benefit analysis in order to determine whether replacing the condenser was worth the costs. This would be the case whether the plant was relicensed or not. *See* Docket 7440 Tr. 5/26/09 at 120-126 (Colomb) (Exhibit 2 attached to the Declaration of Raymond Shadis, dated September 2. 2011). Vermont Yankee Site Vice President Mr. Colomb further admitted that this holds true for any other potential major component replacements that may be required during the period of extended operation. Entergy would need to do a cost/benefit analysis in order to make the decision whether to replace any failed major component, rather than shutting down the plant. *Id.* at 123-126. Mr. Colomb stated that VY's cost/benefit analysis would greatly depend on the price they were getting for the sale of electricity. *Id*.

This becomes even more of an issue as the plant ages, and major components begin to wear to the point where they need to be replaced.[5] One of the revelations from Docket 7440 that highlights the State's concerns regarding potential future economic issues is that Entergy VY

[5] During the Docket 7440 hearings, it was made clear by Entergy witnesses that other components will need to be replaced. *See* Tr. 5/20/09 at 45:

Q. What other major components then might have to be replaced or updated per the aging management plan that have not yet been identified? If the condenser is one that might be identified under the aging management process, correct, that might have to be updated or replaced at some point?
A. Yes, I'm not aware of the list of equipment that may or may not be replaced.
Q. But there might be other major components that have to be replaced or upgraded per the aging management process?
A. Yes. Just as it has been for the first 40 years, that will continue.

does not have a Comprehensive Aging Management Plan in place at this time, and will not have one in place until 2012. *See* NSA Reliability Assessment at 65 (Exhibit 4 attached to the Declaration of Raymond Shadis, dated September 2, 2011); *and* Docket 7440 Tr. 5/26/09 at 105-106 (Colomb) (Exhibit 2 attached to the Declaration of Raymond Shadis, dated September 2, 2011). Similarly, at the time of the hearings before the Board, it was made clear that Entergy did not have a Comprehensive Integrated Asset Management and Long Range Planning Program (or Long Range Asset Management Plan) in place to ensure that it meets its commitments to NRC regarding relicensing. Creating such a program was in Entergy's long range plan, however they were just beginning that process, and did not plan on completing the plan until after the Board had made its decision regarding relicensing, and potentially not until 2012 or even later. Docket 7440 Tr. 5/26/09 at 108-109 (Colomb) (Exhibit 2).

The Long Range Asset Management Plan and the Comprehensive Aging Management Plan are used by VY to ensure continued reliability of the plant. *Id*. at 109. Neither of these programs were in place when the legislature decided to deny continued operation of the plant, and would not be until after that decision had to be made. It is also clear that the legislature was aware of these issues. The Public Oversight Panel report specifically found (in agreement with NSA) that there is a need at VY "for a more comprehensive and integrated asset management and long range planning program, and [] that continuing State verification must monitor the implementation of these aging management programs." *See* POP at 9 (Exhibit 5 attached to the Declaration of Raymond Shadis, dated September 2, 2011).

Due to Entergy's failure to establish a Long Range Asset Management Plan and Comprehensive Aging Management Plan prior to the time that the legislature and Board needed to decide whether continued operation would be in the public good, there was no basis on which

to find that the plant would be able to operate reliably into the future, or that it would be cost-effective for Entergy to continue to operate the plant if and when plant components failed and necessitated costly repairs or replacement. As set forth in Act 189, the potential for component failures to impact the economic interests of the State was of paramount concern, and without an aging management plan in place, the State could not be assured that the operation of the plant would be reliable going forward. This, of course, was highlighted by the leaking underground pipes discovered just prior to the Senate vote, which brought to the forefront the aging management issues that the plant faces.

The aging management of the plant therefore has economic implications, which the State acknowledged in Act 189, stating "It is in the State's economic interests to ensure that the station is a reliable source of power." The potential for Entergy to decide to cease operations whenever they choose based on the costs of repairing or replacing aging plant components poses a real economic threat to Vermont, which provides a valid, non-preempted basis for the State to decide that continued operation is not in the State's interests. The Court must therefore take into consideration that relicensing the plant for an additional 20 years would not mean that the plant can and will be able to operate reliably for another 20 years. Rather, it would allow Entergy to operate the plant only for so long as it is within its economic interests. Nothing would prevent Entergy from shutting down whenever they chose, thereby requiring the State to look elsewhere for energy – potentially at much higher rates.

The potential for Entergy to decide that the need to repair or replace aging components requires them to discontinue operation based on a cost/benefit analysis is a very real concern. According to a February 8, 2011 earnings call wherein Entergy's CEO discussed the 4th quarter 2010 earnings results, it was stated that "over the last few years, VY's earnings contribution to

Entergy at best has simply covered its fully allocated overhead." *See* Entergy Earnings Call transcript excerpt, February 08, 2011 (Exhibit 6 attached to the Declaration of Raymond Shadis, dated September 2, 2011, and incorporated herein by reference). Entergy's own February 8, 2011 earnings call indicates that for several years Vermont Yankee has not been profitable, even though Entergy claims record-breaking runs for the plant. If the plant cannot be profitable when operating for hundreds of consecutive days, then it would appear that a large capital investment to repair or replace aging plant components would not be in Entergy's economic interests. The result of this is that when the condenser, or any other large component, needs to replaced, Entergy's cost/benefit analysis would have to consider the unprofitable nature of VY, and therefore the decision to discontinue operation is very possible. This is precisely the type of reliability concern, with its apparent economic implications, that the State sought to investigate with the reliability assessment pursuant to Act 189.

These economic concerns must be considered in context of the recent history of Entergy's management of the Vermont Yankee plant. Since purchasing the plant, Entergy has allowed a series of events to occur that have eroded the States' faith in their management, and the reliability of the plant. These events include:

- A transformer fire in 2004, caused by a mechanical failure in the generator system, and the root cause was found to be an inadequate inspection program which failed to identify the problem and ensure reliability.
- The 2007 cooling tower collapse caused by inadequate inspection and maintenance programs.
- The subsequent 2008 cooling tower incident, caused by inadequate engineering evaluation and contractor oversight.
- Turbine stop valve incident, wherein a stuck stop valve was hit with a mallet tripping all of the valves and causing a SCRAM event, caused by inadequate troubleshooting and oversight.

See Docket 7440 Tr. 5/26/09 at 136-139 (Colomb) (Exhibit 2). This series of events lead David Lamont, witness for the Department of Public Service, to state during the hearings before the

PSB in Docket 7440 that "there is a growing perception among the public that the current operators of the plant are incompetent." Many other issues related to reliability were known to the Vermont Senate when it declined to approve continued operation.[6]

There is therefore plenty of reason for the State to conclude that continued operation of Vermont Yankee is not in the economic interests of Vermont. Whereas the State has authority to deny continued operation on non-preempted grounds, the State's actions are valid and Entergy's arguments must be denied.

C. Discussions Of Safety In The Legislative Record Do Not Invalidate Vermont's Actions

As discussed above, statements made in the legislative record provide no basis for the Court to find that Vermont's interests were solely based on preempted matters of radiological health and safety pursuant to the Supreme Court's ruling in *PG&E*. During the Preliminary Injunction proceedings in this matter, Entergy pointed to statements made by various legislators regarding concerns over health and safety, and testimony from attorneys, such as Sarah Hoffman of the Department of Public Service, warning the legislature not to base any actions on radiological health and safety due to preemption. Entergy seems to assert that this is some sort of smoking gun, which shows that the legislature altered the language of the legislation, but not

[6] For example, the nuclear industry utilizes a standard Equipment Reliability Index (ERI) to track the reliability of equipment at nuclear plants. ENVY first adopted the ERI in September of 2008. When the ERI was initially adopted at VY, the site ranked in the bottom quartile of the industry. Docket 7440 Tr. 5/26/09 at 111 (Colomb) (Shadis Decl. Exhibit 2). The Public Oversight Panel, convened by the legislature, specifically found that ENVY has been slow to adopt the ERI, and showed concern regarding their low performance. POP at ii (Shadis Decl. Exhibit 5). The Public Oversight Panel further found that ENVY had a higher-than-expected preventative maintenance backlog, *Id*. at iv, and Entergy admitted in PSB Docket 7440 that its preventative maintenance backlog does not meet "excellence in the industry" standards. Docket 7440 Tr. 5/26/09 at 127 (Colomb) (Shadis Decl. Exhibit 2). Many other such items are in the record before the PSB and legislature – too numerous to mention in the limited space provided by the Court for this amicus memorandum. S*ee* the Executive Summary of the Public Oversight Panel Report for more.

its intent, to comply with the law, while still being concerned only with preempted safety matters. This argument is erroneous.

First, the health and safety of Vermonters is a concern that this Court cannot expect the legislature to completely ignore. The legislators have every right to make statements regarding matters that concern them; however, that does not mean that these concerns were the basis for the legislation that was ultimately passed. The legislature cannot be expected to know every limitation to their authority contained in every federal statute. The legislature relies on attorneys like Mrs. Hoffman to inform them of the legal parameters within which they may regulate. The statements made by Mrs. Hoffman, and any subsequent changes to the proposed legislation, should be considered part of the ordinary practice of lawmaking. For Entergy to claim that there was some ulterior motive, rather than the legislators simply taking appropriate legal advice and acting on it to ensure that they did their job correctly, is insulting and unsupported by any evidence.

In addition, Entergy cannot show that it was inappropriate for Vermont's lawmakers to discuss nuclear safety issues, as long as they did not factor those concerns into their decision regarding the issuance of a CPG for extended operation. Vermont was a party to the NRC review of the federal license for extended operation, and continues to be involved in that matter as an Appellant before the D.C. Circuit Court of Appeals. The State has therefore participated in the NRC process, where a discussion of nuclear safety is not only warranted, but is central to the issuance of that license. As a participant in the NRC licensing process, the State had the ability to bring issues and arguments to the NRC regarding nuclear safety. It is thus plausible, and Entergy has not proven to the contrary, that any discussions regarding radiological health and safety issues that took place in the Vermont legislature were intended to inform and allow debate

over how the State would proceed in its participation before the NRC, where such issues should be brought.

There is, then, no basis for the Court to find that the cherry-picked statements Entergy presents from the legislative record indicate that the vote to deny continued operation was premised on preempted concerns of radiological health and safety. Whereas the State had every right to discuss such concerns, and apparently took the advice of counsel and regulated within the limits of their jurisdiction, the State's actions are valid and Entergy's claims must be denied.

III. If The Court Finds In Favor Of Entergy, There Will Be No Regulation Over The State's Economic And Environmental Interests, Eliminating The Participatory Democratic Process That Has Historically Characterized The State's Oversight of Vermont Yankee's Environmental and Economic Impacts

An absurd result would follow from a ruling in Entergy's favor, harming the broad public interests NEC was formed to protect. Entergy seeks a ruling entirely preempting the States from regulating any aspect of nuclear power plants. A ruling in favor of Entergy would eviscerate any oversight, State or Federal, over issues pertaining to the economic, environmental, future land-use, management and electrical generation activities of nuclear power plants, since the NRC does not regulate these areas.[7]

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[7] In fact, when the NRC adopted its regulations governing license renewal, it said that license renewal alone does *not* allow operation without state approval, since the state has jurisdiction over concerns that NRC does not:

> After the NRC makes its decision based on the safety and environmental considerations, *the final decision on whether or not to continue operating the nuclear plant will be made by the utility, State, and Federal (non-NRC) decisionmakers*. This final decision will be based on economics, energy reliability goals, and other objectives over which the other entities may have jurisdiction.

61 Fed. Reg. 28467, 28473 (June 5, 1996) (Statement of Considerations for Environmental Review for Renewal of Nuclear Power Plant Operating Licenses) (emphasis added). *See also* Kolber Ex. 2 to Declaration accompanying Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (NUREG-1437, Vol. 1 (May 1996)), at 1.3 (emphasis added):

> State regulatory agencies and the owners of the plant would ultimately decide whether the plant will continue to operate based on factors such as need for power or other matters

In Public Service Board Docket 7600, Entergy made the extent of its preemption arguments clear, when it argued that pursuant to its interpretation of preemption, the State could not even sanction Entergy for potential violations of the company's stormwater discharge permits, since that would impinge upon the preempted field of decision-making with respect to plant operations. Thus, rather than merely assert preemption of the State's ability to regulate safety-related issues, Entergy seeks to wholly deny States any role whatsoever in the regulation of any aspect of nuclear power facilities.

NEC submits that the States' established right to regulate nuclear power facilities in areas of traditional State concern, such as environmental and natural resource impacts, economic consequences, system reliability, and ratemaking, includes the right of the people residing in the many communities that are impacted by the Vermont Yankee Nuclear Power Plant to participate in a local democratic process to ensure the State has provided adequate protection in those areas. If the Court were to deny the State of Vermont the ability to regulate the environmental and economic impacts of the plant, it would impact not only the organs of the State but also the democratic process the State is meant to facilitate. It would effectively remove ANY oversight regarding these concerns, since no entity other than the state is charged with protecting the economic and land-use related interests of the state.

The Nuclear Regulatory Commission does not have authority to enforce Vermont's Stormwater Regulations, regulate regional electrical system impacts, manage the economic consequences of a particular electric production facility, or control the discharge of pollutants

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within the State's jurisdiction or the purview of the owners. Economic considerations will play a primary role in the decision made by State regulatory agencies and the owners of the plant.

into the waters of the State.[8] If the State of Vermont is denied the ability to regulate such matters, it will be the people residing in the region who will be impacted by the stormwater discharges, reduced electrical system reliability, economic challenges, and direct leakage of pollutants into the Connecticut River. If the State of Vermont is not preempted from regulating in those areas, citizens have redress through the Vermont Legislature and the Public Service Board to ensure that the non-safety aspects of the Vermont Yankee plant are controlled to protect the public's interests. Members of NEC would have the ability to participate in any proceedings before the PSB and the Vermont legislature. NEC implores the Court to dismiss Entergy's Complaint in recognition of the unique impact that depriving the State of Vermont the ability to regulate the environmental and economic impacts of Vermont Yankee would have on NEC's members, who would have no recourse through any political subdivision of the State or Federal government.

It should not be taken lightly that the Vermont Constitution affords "Every person within the State…recourse to the laws, for all injuries or wrongs which one may receive…" Vt. Const., Ch. 1, Art. 4. And there must be meaning to the declaration that, "all power being originally inherent in and consequently derived from the people, therefore, all officers of government, whether legislative or executive, are their trustees and servants; and at all times, in a legal way, accountable to them." Vt. Const., Ch. 1, Art. 6. Yet, by depriving the State of Vermont of any role in regulating nuclear power plants, even in areas of traditional state concern such as

[8] It is well-established by terms of Clean Water Act (33 USCS § 1371(c)) that Nuclear Regulatory Commission must defer to decisions of Environmental Protection Agency with respect to type of cooling system to be employed by nuclear power plant; NRC is bound to follow final EPA decisions on water quality impacts, irrespective of whether they occur before or after NRC decisions and any conditions as to construction of cooling system which conflict with EPA standards are superseded when EPA renders new standards. Consolidated Edison Company of New York, Inc. (1981, CLI) 13 NRC 448. Where EPA authority over, for example, stormwater regulation or direct discharges, is delegated to the State of Vermont, the NRC must defer to the State's Agency of Natural Resources.

environmental and economic impacts, citizens of the state would be denied recourse to the laws for injuries they may receive, and the power inherent in the people (exercised through the offices of government) would be denied. There is no indication in anything cited by the Plaintiffs that Congress intended this absurd result through its preemption of radiological health and safety issues through the AEA. While the State of Vermont has an interest in maintaining its authority to preserve its constitutional principles, it is the people of the region where Vermont Yankee is located who would be deprived of their constitutional right to redress if the State were prohibited from engaging in any regulation whatsoever over the environmental and economic impacts of nuclear power facilities.

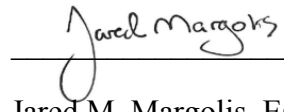
Moreover, if Entergy's complaint is granted, there will effectively be no oversight of the economic and land-use related interests of the State. This would be a ruinous result, leaving the State without adequate means to protect its traditional State concerns, as the Court recognized in *PG&E*. A dangerous precedent would be created, removing from all States any ability to ensure that their economic interests are represented in the regulation of nuclear power plants. Entergy's attempts to eviscerate the State's authority – recognized by the Supreme Court and Congress – must be denied.

D. Conclusion.

For the foregoing reasons, and those set forth in the Defendants' Opposition to Plaintiffs' Complaint, the Court should dismiss the Complaint, *with prejudice*.

Dated at Jericho, Vermont this 2nd day of September, 2011.

NEW ENGLAND COALITION, INC.:

By: 

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Dated at Stowe, Vermont this 2nd day of September, 2011.

By: *____/s/Brice Simon_____*

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